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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

PAUL AHERN, Individually and on behalf of all others similarly situated,

Plaintiff,

- against -

OMEGA PROTEIN CORPORATION, BRET D. SCHOLTES, and ANDREW C. JOHANNESEN,

Defendants.

Case No. 2:17-CV-01720-FMO-JEM

NOTICE OF MOTION AND MOTION OF DEFENDANT OMEGA PROTEIN CORPORATION TO TRANSFER THE ACTION TO THE SOUTHERN DISTRICT OF NEW YORK; MEMORANDUM OF POINTS AND AUTHORITIES

Filed Concurrently with Declaration of John D. Held and Declaration of Richard A. Rosen; [Proposed] Order

Judge: Hon. Fernando M. Olguin
Date: June 1, 2017
Time: 10:00 a.m.
Ctrm: 6D

TO PAUL AHERN AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on June 1, 2017, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Fernando M. Olguin, Courtroom 6D, located in the United States Courthouse, 350 W. First Street, Los Angeles, California 90012, Defendant Omega Protein Corporation will and hereby does move this Court to transfer this action to the United States District Court for the Southern District of New York.

This motion is made pursuant to 28 U.S.C. 1404(a), and it should be granted because (i) this action might have been brought in the Southern District of New York; and (ii) transfer furthers the interests of justice and the convenience of the parties and witnesses.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on April 24, 2017.

This motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of John D. Held filed concurrently herewith, the Declaration of Richard A. Rosen filed concurrently herewith, all of the pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented or considered by the Court prior to its ruling.

Date: May 1, 2017

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Omega Protein Corporation ("Omega" or the "Company") submits this memorandum of points and authorities in support of its motion, pursuant to 28 U.S.C. § 1404(a), to transfer this action to the United States District Court for the Southern District of New York. Omega has not been served in this action, and by making this motion it does not intend to waive any defense it may assert following service, including but not limited to any defense under Fed. R. Civ. P. 12(b).

PRELIMINARY STATEMENT

This putative nationwide class action is a narrower version of a class action already proceeding in the Southern District of New York. The New York action asserts the same claims on behalf of a broader putative class against the same defendants arising from substantially the same events. In both this case and the New York case, the plaintiff alleges that Omega—a Nevada corporation with headquarters in Houston, Texas—and Bret D. Scholtes and Andrew C. Johannesen (senior executives of Omega who reside in Texas, the "Individual Defendants") made false and misleading statements relating to legal proceedings involving one of the Company's subsidiaries in Virginia and Louisiana. The proposed seven-month class in this case is entirely subsumed within the four-year class proposed in the New York action. The New York action has progressed further than this case—with all defendants having been served, an agreed schedule for filing an amended complaint and briefing on motions to dismiss, and an initial conference with the court scheduled only a week from today.

In these circumstances, transfer to the Southern District of New York for consolidation or coordination with the parallel case there would serve the central purpose of Section 1404—to avoid "a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts lead[ing] to the wastefulness of time, energy and money." *Ferens* v. *John*

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Deere Co., 494 U.S. 516, 531 (1990) (quotation marks omitted). Litigating these case separately would waste the resources of the courts and the parties, inconvenience witnesses and potential jurors, and risk conflicting outcomes.

For these reasons, Omega respectfully submits that this action should be transferred to the Southern District of New York.

BACKGROUND AND PROCEDURAL POSTURE

The background of this dispute set forth herein is based upon the Complaint (cited as "¶ __"), the accompanying Declarations of Richard A. Rosen ("Rosen Decl.") and John D. Held ("Held Decl."), and the Exhibits thereto (cited as "Ex. _").

The Parties

Omega is a nutritional products company that develops, produces, and delivers products to improve the nutritional integrity of foods, dietary supplements, and animal feeds. (¶ 7.) Omega is incorporated in Nevada and headquartered in Houston, Texas, and the Company's common stock trades on the New York Stock Exchange. (*Id.*)

As set forth in the Company's most recent Form 10-K, Omega operates through subsidiaries in two principal lines of business: the animal nutrition segment, operated through Omega Protein, Inc. ("Omega Protein") and another subsidiary; and human nutrition, conducted through subsidiaries under the trade name "Bioriginal." (Held Decl. ¶¶ 3, 5; Ex. 1, at 3.) Omega Protein has its headquarters in Houston, Texas, and operates processing plants and other facilities in Louisiana, Mississippi, and Virginia. (*Id.* ¶ 4; Ex. 1, at 3.) Separate subsidiaries, in Omega's human nutrition segment, operate a sales office and distribution facility in Irvine and Carson, California respectively. (*Id.* ¶ 5.) As set forth below, the matters at issue in this dispute exclusively involve Omega Protein and its facilities in Virginia and Louisiana.

Defendant Bret D. Scholtes has been Omega's Chief Executive Officer since January 1, 2012, and Defendant Andrew C. Johannesen has been the Company's Chief Financial Officer and an Executive Vice President over the same period. (¶¶ 8-9.) Both of the Individual Defendants live in Texas and work at the Company's headquarters in Houston. (Held Decl. ¶ 6.)

Plaintiff Paul Ahern alleges that he purchased 262 shares of Omega common stock on January 11 and 12, 2017, and sold his stock on March 3, 2017. (¶ 6 and accompanying Certification.) Plaintiff seeks to represent a putative class of persons who purchased or otherwise acquired publicly traded Omega securities over seven-month period August 3, 2016 through March 1, 2017 (the "Class Period.") (¶¶ 1, 24.)

Factual Background

This action, as well as the parallel New York action, arise from plea agreements entered into by Omega Protein (as noted, Omega's principal subsidiary in the animal nutrition segment) concerning environmental compliance at Omega Protein's Virginia and Louisiana facilities, and Omega's public disclosures about those matters.

In June 2013, Omega Protein entered into a plea agreement with the United States Attorney's Office for the Eastern District of Virginia to resolve a government investigation relating to its Reedville, Virginia fishing vessels and operations. (¶ 15.) As part of the plea agreement, Omega Protein pled guilty to two counts under the Clean Water Act, paid a $5.5 million fine, contributed $2 million to an environmental protection fund, and was sentenced to a three-year probation term scheduled to end in June 2016. (¶ 16.)

On August 3, 2016, in its Form 10-Q for the second quarter of 2016, Omega disclosed that it had received a petition from the U.S. Attorney's Office for the Eastern District of Virginia seeking to revoke Omega Protein's probation based on alleged Clean Water Act violations. (Held Decl., Ex. 3, at 18, 32.) In the same filing, the Company also disclosed that it had become aware of a criminal investigation being conducted by the U.S. Attorney's Office for the Western District of Louisiana into the waste water discharge practices of Omega Protein's facility in Abbeville, Louisiana. (*Id.*)

On December 16, 2016, in a Form 8-K filed with the SEC, the Company announced that Omega Protein had entered into a plea agreement with the U.S. Attorney's Office for the Western District of Louisiana, pursuant to which it agreed to plead guilty to two counts under the Clean Water Act. (¶ 19.) In the same filing, the Company also announced that a federal district court in Virginia had imposed an additional two-year probation period on Omega Protein in connection with its 2013 plea. (*Id.*)

On March 1, 2017, Omega filed its Form 10-K for the 2016 fiscal year, in which it disclosed that in December 2016 it had received a subpoena from the SEC requesting information "in connection with an investigation relating to a Company subsidiary's compliance with its probation terms and the Company's protection of whistleblower employees." (¶ 21 (quoting Omega's Form 10-K)). On the same day, Omega announced its earnings per share for the fourth quarter of 2016. (Held Decl., Ex. 2.) On March 2, 2017, Omega's stock price fell $6.25, or 23.81%, to close at $20.00. (¶ 22.)

The New York Actions

The Malone Action. On March 2, 2017, an action was commenced against defendants in the Southern District of New York asserting claims under the federal securities laws on behalf of a putative nationwide class of persons who acquired Omega securities over a period of slightly less than four years, between June 4, 2013 and March 1, 2017. *Malone* v. *Omega Protein Corp.*, No. 1:17-cv-01596 (S.D.N.Y.) (Rosen Decl., Ex. 4 (*Malone* complaint), ¶ 1.). As in this case, the plaintiff in *Malone* asserted claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, alleging that Omega had made false or misleading statements relating to Omega Protein's plea agreements. The *Malone* complaint alleged that defendants violated the Exchange Act and Rule 10b-5 by

> fail[ing] to disclose: (1) that Omega's subsidiary [*i.e.*, Omega Protein] was potentially not in compliance with its probation terms; (2) that the Company was not properly protecting whistleblower employees; (3) that, as a result of the foregoing, the Company was vulnerable to an SEC investigation and potential civil and criminal liability; and (4) that, as a result of the foregoing, Defendants' statements about Omega's business, operations, and prospects, were false and misleading and/or lacked a reasonable basis.

(*Id.* ¶ 5.) The *Malone* action was assigned to Judge P. Kevin Castel. (Rosen Decl. ¶ 3.)

On March 23, 2017, counsel for the parties in *Malone* reached agreement on a schedule for the filing of a consolidated amended complaint and briefing on a motion to dismiss, and defense counsel agreed to accept service on behalf of defendants. (*Id.* ¶ 4.) On March 24, 2017, defense counsel filed a notice of appearance in *Malone* and sent to plaintiff's counsel a proposed stipulation embodying the parties' agreement. (*Id.*)

On March 28, 2017, with no explanation to the Court or prior notice to defense counsel, and without disclosing the parties' agreement, plaintiff in *Malone* filed a notice of voluntary dismissal without prejudice. (*Id.* ¶ 5; Ex. 5.)

The Diehl Action. Approximately a week later, on April 5, 2017, a second, virtually identical complaint was filed in the Southern District of New York. *Diehl* v. *Omega Protein Corp.*, No. 1:17-cv-02448 (S.D.N.Y.) (Rosen Decl., Ex. 6.) The *Diehl* complaint, like the complaint in *Malone*, asserted claims under Sections 10(b) and 20(a) and Rule 10b-5 against the same defendants, arising from the same underlying facts, purportedly on behalf of the same four-year putative class. (*Id.*) On April 6, 2017, *Diehl* was assigned to Judge Castel as related to *Malone*. (Rosen Decl. ¶ 6.)

The *Diehl* action has been moving forward. Counsel for defendants have filed notices of appearance; defense counsel has accepted service of process on behalf of all defendants; and Omega has filed a corporate disclosure statement. (*Id.* ¶ 7.) On April 18, 2017, the parties submitted to the Court an agreed schedule for the filing of a consolidated amended complaint and briefing on a motion to dismiss, and the court entered the stipulation with certain modifications the same day. (*Id.* Ex. 8.) On April 19, 2017, at the court's direction, the parties submitted a joint letter to the court describing the case, contemplated motions, and prospects for settlement. (*Id.* Exs. 7, 9.) The letter also advised the court of the pendency of this action and the prior *Malone* case and of defendants' intention to move to transfer this action. (*Id.* Ex. 9.) After receipt of the parties' letter, Judge Castel confirmed the scheduling of an initial pretrial conference for May 8, 2017. (*Id.* Ex. 10.)

This Action

Plaintiff commenced this action on March 3, 2017, a day after the filing of the *Malone* complaint in New York. (Dkt. No. 3.) Like the plaintiffs in *Malone* and *Diehl*, plaintiff here alleges that defendants violated Sections 10(b) and 20(a) and Rule 10b-5 by making false or misleading statements about Omega Protein's plea agreements, the SEC investigation, and Omega's disclosures about those matters. (¶ 20.) Plaintiff alleges that

> Defendants made false and/or misleading statements and/or failed to disclose that: (1) the SEC is requesting information in connection with an investigation relating to Omega's subsidiary's compliance with its probation terms and Omega's protection of whistleblower employees; (2) it is possible that the foregoing matter could result in a material adverse effect on Omega's business, reputation, results of operation and financial condition; and (3) as a result, Defendants' statements about Omega's business, operations and prospects were

> materially false and misleading and/or lacked a reasonable bases at all relevant times.

(*Id*.)

The Complaint here, however, is substantially narrower than the *Malone* and *Diehl* complaints. As noted, plaintiff seeks to represent a class of persons who acquired Omega securities over a period of approximately seven months (August 3, 2016 through March 1, 2017), rather than the four-year putative classes in *Malone* and *Diehl*. Consistent with the narrower Class Period, plaintiffs in the New York actions complain about the adequacy of Omega's disclosures over the same four-year period, rather than the more narrow set of disclosures at issue here. (*Compare* Rosen Decl, Ex. 4, ¶¶ 17–24 and *id*. Ex. 6, ¶¶ 18–28 *with* Complaint ¶¶ 17–20.)

There have been no developments in this case since the filing of the Complaint. In contrast to *Malone* and *Diehl*, defendants have not been served with process, and there is no agreement on scheduling or other matters. (Rosen Decl. ¶ 8.)

ARGUMENT

THE COURT SHOULD EXERCISE ITS DISCRETION UNDER 28 U.S.C. § 1404 TO TRANSFER THIS ACTION TO THE SOUTHERN DISTRICT OF NEW YORK

Under 28 U.S.C. § 1404, the Court "may transfer any civil action to any other district or division" when (i) "it might have been brought" in the transferee district and (ii) the transfer furthers "the convenience of the parties and witnesses" and "the interests of justice." 28 U.S.C. § 1404(a). Section 1404(a) serves "to prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen* v. *Barrack*, 376 U.S. 612, 616 (1964) (quotation marks omitted).

As the Supreme Court has recognized, Section 1404(a) applies directly in circumstances such as those here, where cases involving the same parties and issues are pending in different districts. The Court has held that "to

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permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Ferens* v. *John Deere Co.*, 494 U.S. 516, 531 (1990) (quotation marks omitted).

To avoid such wastefulness here, the Court should exercise its discretion under Section 1404 to transfer this action to the Southern District of New York. As we now discuss, all of the factors required for transfer under Section 1404 are satisfied: the action could have been brought in the Southern District of New York (as the broader *Malone* and *Diehl* cases were), and the convenience of parties and the interests of justice favor one action in that forum, not multiple, overlapping actions between the same parties.

A. This Action Might Have Been Brought in the Southern District of New York.

There can be no serious dispute that this case could have been brought originally in the Southern District of New York, as the *Malone* and *Diehl* cases were. That court, like this Court, has subject-matter jurisdiction over federal securities claims pursuant to 28 U.S.C. § 1331 and Section 27 of the Exchange Act, 15 U.S.C. § 78aa. Under 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b), venue would be proper in the Southern District of New York, where, as noted, Omega's common stock trades on the New York Stock Exchange. *See United States* v. *Svoboda*, 347 F.3d 471, 484 (2d Cir. 2003) ("[T]he execution of trades on the New York Stock Exchange is sufficient to establish venue in the Southern District of New York.").

B. The Convenience of the Parties and Witnesses and the Interests of Justice Weigh in Favor of Transfer to the Southern District of New York.

Courts consider a variety of factors when deciding whether transfer would further the convenience of the parties and witnesses and the interests of justice. Those factors include:

> (1) the plaintiff's choice of forum; (2) the extent to which there is a connection between the plaintiff's causes of action and th[e] forum; (3) the parties' contacts with th[e] forum; (4) the convenience of witnesses, (5) the availability of compulsory process to compel attendance of unwilling non-party witnesses; (6) the ease of access to sources of proof; (7) the existence of administrative difficulties resulting from court congestion; (8) whether there is a "local interest in having localized controversies decided at home"; (9) whether unnecessary problems in conflict of laws, or in the application of foreign law, can be avoided; and (10) the unfairness of imposing jury duty on citizens in a forum unrelated to the action.

Bohara v. *Backus Hosp. Med. Benefit Plan*, 390 F. Supp. 2d 957, 961-62 (C.D. Cal. 2005) (citing *Jones* v. *GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000); *Decker Coal Co.* v. *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986); 28 U.S.C. § 1404(a)). The seventh factor, regarding court congestion, has also been called a "judicial economy" factor. *See Celestial Mechanix, Inc.* v. *Susquehanna Radio Corp.*, No. CV 03-5834, 2005 WL 4715213, at *2 (C.D. Cal. Apr. 28, 2005). All of these factors weigh in favor of transfer or are neutral.

1. Plaintiff's Choice of Forum Is Not Entitled to Deference.

Plaintiff's choice of forum in the Central District of California should not be afforded any deference, because he seeks to represent a nationwide class and because this case has nothing to do with California. Where, as here, a plaintiff "represents a class, the named plaintiff's choice of forum is given less weight." *Lou* v. *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *see also Johns* v. *Panera Bread Co.*, No. 08-1071, 2008 WL 2811827, at *2 (N.D. Cal. July 21, 2008)

("Plaintiff's decision to represent a nationwide class substantially undercuts th[e] deference" normally accorded a plaintiff's choice of forum). Moreover, "[i]f the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [the plaintiff's] choice is entitled to only minimal consideration." *Lou*, 834 F.2d at 739.

That is the situation here: Plaintiff seeks to represent a nationwide class, not merely a class of purchasers in California. And other plaintiffs purporting to represent the same class have filed suit in the Southern District of New York. As set forth above, none of the operative facts occurred in California. Rather, the allegations of the Complaint focus on Houston, Texas, where Omega has its corporate headquarters, and in facilities of Omega Protein in Louisiana and Virginia. In these circumstances, plaintiff's choice of forum in this district should carry no weight.

2. Judicial Economy and Convenience of Witnesses Support Transfer.

"'[C]onsideration of the interest of justice, which includes judicial economy, may be determinative to a particular transfer motion, even if the convenience of the parties and witnesses might call for a different result.'" *Puri* v. *Hearthside Food Solutions LLC*, No. CV 11-8675, 2011 WL 6257182, at *3 (C.D. Cal. Dec. 13, 2011) (quoting *Regents of the University of Cal.* v. *Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997) (internal quotation marks omitted)). Here, judicial economy and the convenience of the parties are in harmony, and both weigh heavily in favor of transfer to the Southern District of New York.

With regard to judicial economy, the overriding reason for transfer is the avoidance of duplicative litigation. *See id.* ("'The pendency of related actions in the transferee forum is a significant factor in considering the interest of justice factor.'" (quoting *Jolly* v. *Purdue Pharma L.P.*, No. 05-CV-1452H, 2005 WL 2439197, at *2 (S.D. Cal. Sept.28, 2005)). As discussed above, plaintiff's claims

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in this case are subsumed within the claims pending in *Diehl*. In both cases, plaintiffs bring the same claims—under Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 thereunder—against the same defendants, and in both cases those claims are premised on alleged statements or omissions by defendants related to Omega Protein's environmental compliance and the SEC's investigation into that subject. To litigate both of these cases would be almost entirely duplicative. Because *Diehl* involves a broader class and broader claims, and is already farther along procedurally, the most economical decision would be to transfer this case to the Southern District of New York, for consolidation or coordination with *Diehl*. In light of *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), there is also an unsettled question whether the Court would have jurisdiction over the Individual Defendants in this action.

For much the same reasons, convenience of the witnesses also counsels in favor of transfer. The most inconvenient outcome for witnesses would be to have to participate in two separate actions in two different courts, including potentially to have to testify twice in separate depositions and at separate trials. While, to our knowledge, the principal witnesses are not located in either New York or California, New York is a more convenient forum for any witnesses located on the East Coast in Virginia or Louisiana, while the convenience of California and New York for witnesses in Houston is substantially the same. Thus, the convenience of the parties strongly weighs in favor of litigating these matters in a single forum, and, on balance, also favors New York rather than California as the more convenient forum.

3. None of the Other Section 1404 Factors Weigh Against Transfer.

None of the remaining factors tip the scale against transfer. First, as discussed, to the extent that plaintiff's claims have any connection to either forum, they have more connection to the Southern District of New York, where the securities at issue are listed and trade on the New York Stock Exchange. While the Complaint alleges that Omega "maintains offices and warehouses in Irvine, California" (¶ 7), as noted above, the Omega subsidiaries located in California have no relation to the matters at issue. (Held Decl. ¶ 5.)

For essentially the same reasons, the remaining factors are neutral. None of factors (5), (6), and (10)—the availability of process to compel attendance of unwilling non-party witnesses; the ease of access to sources of proof; the "local interest in having localized controversies decided at home"; and the unfairness of imposing jury duty on citizens in a forum unrelated to the action—weigh in favor of either forum. Regarding factor (3), the parties' contact with the forum, the nationwide class that plaintiff seeks to represent undoubtedly includes investors located in both New York and California. As discussed above, Omega's connections with California are minimal, and the Individual Defendants have no material connections to this State. Finally, neither forum presents problems in conflict of laws or in the application of foreign law, so this last factor does not weigh against transfer.

4. The First-Filed Principle Does Not Call For a Different Result.

Plaintiff may rely on the so-called "first-filed" principle to argue that, because this action was filed approximately a month before the *Diehl* action in New York, Omega's transfer motion should be denied. As the Ninth Circuit has emphasized, however, "[t]he most basic aspect of the first-to-file rule is that it is discretionary. . . . [D]istrict court judges can, in the exercise of their discretion, dispense with the first-filed principle for reasons of equity." *Alltrade, Inc.* v. *Uniweld Prods., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991); *see also Adoma* v. *Univ. of Phoenix, Inc.*, 711 F. Supp. 2d 1142, 1146 (E.D. Cal. 2010) (noting that "[t]he district court retains the discretion . . . to disregard the first-to-file rule in the interests of equity").

Here, for at least three reasons, the first-filed principle does not justify denying this motion. *First*, as set forth above (pp. 4–7), the first-filed action in this litigation was not the present case, but the *Malone* action in New York, which was commenced the day before this action. While that case was later voluntarily dismissed without explanation, and after counsel for plaintiff there had reached an agreement on scheduling with defendants' counsel, the present *Diehl* action was commenced only six business days later and is pending before the same judge, and the complaint in that case is substantially identical to the complaint in *Malone*. In these circumstances, to treat this case as "first filed" would be, at best, entirely artificial.

Second, as courts have recognized, "when the later-filed action has progressed further, . . . efficiency considerations disfavor application of the rule." *Guthy-Renker Fitness, L.L.C.* v. *Icon Health & Fitness, Inc.*, 179 F.R.D. 264, 270 (C.D. Cal. 1998); *see also, e.g.*, *Adoma*, 711 F. Supp. at 1150 (finding "the equities in this case tip in favor of an exception to the first-to-file rule" where the first-filed action had not advanced as far as the later-filed action). That principle applies here, where the *Diehl* action is further along procedurally than this action.

Third, courts routinely depart from the first-to-file rule when the "balance of convenience" favors the later-filed action, where the "balance of convenience" is determined by considering the Section 1404(a) factors. *See Emp'rs Ins. of Wausau* v. *Fox Entm't Grp.*, 522 F.3d 271, 275 (2d Cir. 2008).

For these reasons, the first-filed principle does not override the Section 1404 analysis or justify denying transfer here.

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CONCLUSION

For the reasons set forth above, defendant's motion to transfer this action to the Southern District of New York should be granted.

Dated: May 1, 2017

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